Comment

The Evolution of the Public Figure Doctrine in Defamation Actions

In the landmark[1] decision of *New York Times Company v. Sullivan*[2] the United States Supreme Court sought a balance between two conflicting societal interests—the historical reputational interest, which is protected by a defamation action, and the more recently developed interest in the maintenance of a free and unencumbered press, as that interest is embodied in the first amendment.[3] The *Times* Court held that a "public official" could successfully sue in a libel action based upon statements concerning his conduct in office only upon a showing that the publication was made with "actual malice."[4] Subsequently, in the companion cases of *Curtis Publishing Company v. Butts* and *Associated Press v. Walker*,[5] the Court extended the *Times* doctrine to apply in those cases in which the plaintiff was a "public figure."[6] Further extension in the application of the *Times* malice standard occurred in *Rosenbloom v. Metromedia, Inc.*,[7] in which a plurality of the Court held that the *Times* standard must be satisfied any time the allegedly defamatory publication concerned "matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[8]

The *Rosenbloom* "public interest" test was expressly rejected by the Court in *Gertz v. Robert Welch, Inc.*[9] In *Gertz* the Court retreated to its pre-*Rosenbloom* position and held that the *Times* malice standard need be met only by a plaintiff who was either a "public official" or a "public figure."[10] Unfortunately, in attempting to define a "public figure,"[11] the *Gertz* Court formulated an amorphous standard that lower courts have found difficult to interpret.[12] In each of two recent cases, *Hutchinson v.*

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1. *See* L. ELDREDGE, THE LAW OF DEFAMATION § 51, at 255 (1978) ("effected a profound change in the hitherto settled law of defamation and overruled the prior common law of practically every state"); W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 118, at 819 (4th ed. 1971) ("unquestionably the greatest victory won by the defendants in the modern history of the law of torts").

2. 376 U.S. 254 (1964).

3. *Id.* at 279-83.

4. *See* note 46 and accompanying text *infra*.

5. 388 U.S. 130 (1967).

6. *Id.* at 155.

7. 403 U.S. 29 (1971).

8. *Id.* at 44.

9. 418 U.S. 323 (1974).

10. *Id.* at 345-46.

11. *See* notes 94-97 and accompanying text *infra*.

12. *See* Bamberger, *Public Figures and the Law of Libel: A Concept in Search of a Definition*, 33 BUS. LAW. 709 (1978) ("[I]t is both surprising and unfortunate that the term has not been given clear definition. Courts, in discussing who or what is a 'public figure,' have, for the most part, failed to shed significant light on, and have in many cases even failed to discuss, the relevant determining factors.").

Proxmire[13] and *Wolston v. Reader's Digest Association*,[14] a district court decision applying the *Gertz* standard was affirmed by the circuit court but subsequently reversed by the Supreme Court, which failed to clarify the standard in a manner that would provide distinct guidelines for the lower courts.[15]

Focusing on the *Hutchinson* and *Wolston* cases, this Comment will explore the *Gertz* public figure standard. Part I discusses the evolution of the defamation action and its inevitable collision with first amendment values. Part II focuses on the *Gertz* decision, and analyzes the public figure standard that has emerged. Part III exposes the weaknesses of the *Gertz* standard, through analysis of the recent *Hutchinson* and *Wolston* decisions. Finally, Part IV offers suggestions for clarifying the public figure standard that, while hopefully improving the standard, do not significantly alter the balance that the Supreme Court has struck between reputational interests and first amendment values. Note that while that balance has itself been the source of considerable commentary and debate,[16] the focal point of this Comment is that, even accepting the present balance as appropriate, the public figure standard that has been formulated is deficient because it fails to provide adequate guidelines for the lower courts in making the public figure determination. It is suggested that adoption of the standard proposed in this Comment would facilitate a greater consistency of application, such that predictability, which is vital if those who counsel media publishers are to offer sound legal advice, might become possible in this area of the law.

I. EVOLUTION OF THE DEFAMATION ACTION

A. *Common Law: The Pre-*New York Times *Standard*

Defamation is an invasion of an individual's interest in reputation and good name.[17] Such invasions have long been forbidden, even in Mosaic

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13. 443 U.S. 111 (1979).

14. 443 U.S. 157 (1979).

15. *See* text accompanying notes 137-153 *infra*.

16. *See* Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975); Ashdown, Gertz & Firestone: *A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645 (1977); Ashdown, *Media Reporting and Privacy Claims—Decline in Constitutional Protection for the Press*, 66 KY. L.J. 759 (1977-78); Beytagh, *Privacy and a Free Press: A Contemporary Conflict in Values*, 20 N.Y.L.F. 453 (1975); Brosnahan, *From* Times v. Sullivan *to* Gertz v. Welch: *Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L. J. 777 (1975); Frakt, *The Evolving Law of Defamation*: New York Times Co. v. Sullivan *to* Gertz v. Robert Welch, Inc. *and Beyond*, 6 RUT-CAM. L.J. 471 (1975); Godofsky, *Protection of the Press from Prior Restraint and Harassment Under Libel Laws*, 29 U. MIAMI L. REV. 462 (1975); Green, *Political Freedom of the Press and the Libel Problem*, 56 TEX. L. REV. 341 (1978); Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221 (1976); Lee, *The Supreme Court on Privacy and the Press*, 12 GA. L. REV. 215 (1978); Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Welch, Inc., 54 TEX. L. REV. 199 (1976); Skene, *Watchdogs and Leash Laws: Restraints on the Press*, 30 MERCER L. REV. 615 (1979); Wade, *The Communicative Torts and the First Amendment*, 48 MISS. L.J. 671 (1977).

17. W. PROSSER, *supra* note 1, § 111, at 737.

law, although apparently at that time no punishment was specified.[18] The Law of Twelve Tables, written three hundred years after the founding of ancient Rome, provided that whoever slandered another "by words or defamatory verses" and injured his reputation should be beaten with a club.[19] In modern tort law, a defamatory communication is defined as one that tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.[20] Traditionally, defamation has been actionable for written communications, giving rise to a libel action, and oral communications, giving rise to an action for slander.[21]

In the common law of both England and the United States defamation was, until 1974,[22] a part of the tort law of strict liability.[23] Thus, in the United States before 1974, if a false communication was made that could be reasonably understood to be defamatory and to refer to the plaintiff,[24] the defendant published at his peril. The plaintiff was not required to show that the defendant had engaged in culpable conduct.[25] The law would impose liability on a defendant if he published a false and defamatory statement concerning the plaintiff on an unprivileged occasion.[26] In addition, at common law, a defamation plaintiff who alleged either libel or slander per se could succeed without any showing of actual damage.[27] The existence of damage was conclusively presumed from the publication itself, without additional evidence that there was any damage at all.[28]

18. M. NEWELL, THE LAW OF LIBEL AND SLANDER IN CIVIL AND CRIMINAL CASES 2-4 (2d ed. 1898).

19. *Id.* at 6.

20. *See* RESTATEMENT (SECOND) OF TORTS § 559 (1977).

21. *See* L. ELDREDGE, *supra* note 1, § 12, at 77. Note, however, that technology, and specifically the advent of the broadcast media, has made the libel-slander distinction a blurred one. The more modern approach is to look to the area of dissemination, the deliberate and premeditated character of the publication, and the persistence of the defamation in determining whether a libel or a slander has occurred. *See* RESTATEMENT (SECOND) OF TORTS § 568 (1977). Additionally, a defamatory broadcast is most often recognized as libel. *Id.* § 568A.

22. *See* notes 84-98 and accompanying text *infra* (discussion of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)).

23. L. ELDREDGE, *supra* note 1, § 5, at 15.

24. A plaintiff did not have to sustain the burden of proving that the defamatory communication was false. Rather, the burden of proving truth was placed on the defendant as an affirmative defense. *See* L. ELDREDGE, *supra* note 1, § 63, at 323-24.

25. Thus, if it was published that A was engaged to B when in fact A was already married, the publisher was liable, regardless of whether he had knowledge of A's marriage.

26. L. ELDREDGE, *supra* note 1, § 5, at 15. *See also* text accompanying notes 31-35 *infra* (general discussion of privilege).

27. At common law, the general rule is that one who sues for libel need not show any damages. Conversely, slander generally is actionable only where the plaintiff can prove damage. To this limitation on actionable slander, courts have fashioned four slander per se exceptions, that is, four instances where slander is actionable without any showing of damage: imputation of a crime, imputation of a loathsome disease, imputation of unchastity of a woman, and defamatory communications made to those affecting the plaintiff in his business, trade, profession, office, or calling. *See* W. PROSSER, *supra* note 1, § 112, at 754; RESTATEMENT (SECOND) OF TORTS §§ 569-570.

28. W. PROSSER, *supra* note 1, § 112, at 762. Thus, a jury could award substantial damages based upon the presumption that where there was a libelous or slanderous per se defamation, an impairment of reputation would follow.

Therefore, a defamation plaintiff who was alleging either libel or slander per se made out a prima facie case upon showing that the defendant had published a communication to a third person, which the recipient third person reasonably understood to be defamatory and to refer to the plaintiff.

Truth and privilege were the only defenses to the common law defamation action.[29] While a plaintiff was not obliged to plead falsity, a defendant who could show the publication to be truthful was protected, regardless of the opprobrium inflicted on the plaintiff's reputation.[30] A privilege could be either absolute—completely shielding a defendant from liability—or conditional[31]—shielding a defendant only if the publication was undertaken in a reasonable manner and for a proper purpose. An absolute privilege attached to communications made by the participants in judicial and legislative proceedings, executive communications, communications between husband and wife, and communications required by law.[32] A conditional privilege existed for communications made to protect the interests of the publisher, the recipient, or a third person, communications made to protect a common interest, communications made within a familial relationship, and communications made to one empowered to act in the public interest.[33] Additionally, a conditional privilege developed for the reporting of public proceedings ("fair report")[34] and for the criticism of certain public individuals ("fair comment").[35] A plaintiff could defeat a defendant's assertion of a conditional privilege by showing that the publication was for a purpose other than that protected by the privilege.[36] This was often accomplished by showing that the publication was motivated solely by defendant's desire to harm the plaintiff, or out of the defendant's hatred or contempt for the plaintiff, often referred to as publication with "express malice."[37]

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29. *Id.* § 114, at 776.

30. Note, however, that the defendant had to show more than that the words of the alleged defamation were literally true. Rather, the bite or sting of the communication had to be proven true. Thus, if the defendant had stated that A had called the plaintiff a thief, the defendant would be required to show that the plaintiff was, in fact, a thief—not merely that A had said that plaintiff was a thief, because the imputation of defendant's statement would have been that the plaintiff was a thief. *See* L. ELDREDGE, *supra* note 1, § 68, at 332.

31. Sometimes referred to as a "qualified" privilege.

32. *See* RESTATEMENT (SECOND) OF TORTS §§ 585-592A (1977). *See also* A. HANSON, LIBEL AND RELATED TORTS §§ 108-122, at 85-93 (1969); W. PROSSER, *supra* note 1, § 114, at 776-85.

33. *See* RESTATEMENT (SECOND) OF TORTS §§ 594-598 (1977). *See also* A. HANSON, *supra* note 32, §§ 123-128, at 95-99; W. PROSSER, *supra* note 1, § 115, at 785-96.

34. *See* L. ELDREDGE, *supra* note 1, § 79, at 419.

35. *See* text accompanying notes 38-42 *infra*.

36. *See* RESTATEMENT (SECOND) OF TORTS § 603 (1977) ("One who upon an occasion giving rise to a conditional privilege publishes defamatory matter concerning another abuses the privilege if he does not act for the purpose of protecting the interest for the protection of which the privilege is given."). A conditional privilege could also be abused by excessive publication or by publication of unprivileged matter along with the privileged matter. RESTATEMENT (SECOND) OF TORTS §§ 604, 605A (1977).

37. *See* L. ELDREDGE, *supra* note 1, § 93, at 508-10. At common law, "malice"—usually defined as spite, ill-will, or contempt for another—was also important with respect to assessing damages. A

From a constitutional standpoint, the most significant of the common law privileges was the qualified privilege of "fair comment."[38] The "fair comment" privilege applied to publications that consisted of comment upon "public officials, political candidates, community leaders from the private sector or private enterprises which affect public welfare, persons taking a public position on a matter of public concern, and those who offer their creations for public approval such as artists, performers, and athletes."[39] Thus, the privilege generally protected comment upon matters of public concern, including the conduct and qualifications of public officials and employees. In the majority of states, the fair comment privilege was limited to opinion, criticism, and comment, and did not extend to false assertions of fact, even if the declarant had a good faith belief in their truth.[40] There was, however, a vigorous minority view that fair comment protected even false statements of fact if they were made for the public benefit and with an honest belief in their truth.[41] It was argued that the public interest demanded that those who were in a position to furnish information about public servants should not be deterred by fear of suit and the resultant necessity of proving truth.[42] It was this minority position that the United States Supreme Court later adopted on constitutional grounds in the *New York Times* decision.[43]

B. New York Times Co. v. Sullivan: *The Emergence of a First Amendment Privilege*

In 1957, Justice Brennan, speaking for the United States Supreme Court, concluded that "libelous utterances are not within the area of constitutionally protected speech."[44] In the 1964 decision of *New York Times Co. v. Sullivan*,[45] however, Brennan represented a unanimous court when he wrote that "[c]onstitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it

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plaintiff who could show that a defamation was made with "malice" could recover punitive damages from the defendant. *Id.* § 95, at 541.

38. Robertson, *supra* note 16, at 201.

39. A. HANSON, *supra* note 32, § 138, at 104. *See also* RESTATEMENT (SECOND) OF TORTS §§ 607-610 (1977).

40. *See* W. PROSSER, *supra* note 1, § 118, at 819.

41. *Id.* at 820.

42. *Id.*

43. A. HANSON, *supra* note 32, § 140, at 106.

44. Roth v. United States, 354 U.S. 476, 482-83 (1957). This language can be traced to an opinion written by Justice Frankfurter in Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

45. 376 U.S. 254 (1964). The New York Times had published a paid advertisement, signed by several prominent and influential individuals, that complained of the conduct of the police in dealing with a racial disturbance in Montgomery, Alabama. Police Commissioner Sullivan brought a libel action against the Times based upon a few rather insignificant factual inaccuracies in the publication. At the trial level, the jury returned a verdict of $500,000 for Sullivan. On appeal, the Alabama Supreme Court affirmed.

was false or with reckless disregard of whether it was false or not."[46] In essence, the Court had extended constitutional protection for the honest misstatement of facts concerning the official conduct of a public official. Furthermore, the *Times* Court held that the public official plaintiff had to prove the malice with "convincing clarity"[47] rather than the more often employed standard of proof by a preponderance of the evidence.[48] Thus, the Court in *New York Times v. Sullivan* for the first time balanced the protection of reputational interest that is afforded by a defamation action with the first amendment mandate of a free press. The Court alluded to "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"[49] and concluded that "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' "[50] By requiring the public official plaintiff to show "actual malice," the Court had altered the common law, where there was no requirement that malice, either "express" or "actual," be shown, except as it might be used to defeat a privilege.[51]

Two years after the *Times* decision, the Court provided a more definitive standard for determining when a plaintiff qualified as a public official who would have to meet the *Times* standard.[52] Speaking for the Court, Justice Brennan stated, "Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, . . . the *New York Times* malice standards apply."[53]

C. *The Extension of the* Times *Standard to Public Figures*

As one commentator noted, "A Constitution which protects 'public discussion of public issues' could not long be constrained in its application to public officials alone."[54] Indeed, this assertion is buttressed by the consideration that the genesis of the *Times* doctrine existed in the common

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46. *Id.* at 279-80. Brennan's decision to use this "malice" language was an unfortunate one. "Malice" already had a meaning in the common law of defamation—a meaning that involved elements of spite, ill-will, or contempt. *See* note 37 *supra*. Thus, a good deal of confusion has resulted. *See* Eaton, *The American Law of Defamation through* Gertz *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1370-71 (1975) (Court still distinguishing common law "express malice" from "actual malice" a full decade after the *Times* decision).

47. 376 U.S. 254, 285-86 (1964). Subsequently, the Supreme Court has used this "convincing clarity" language interchangeably with the more traditional "clear and convincing evidence" standard.

48. Thus, while the Court has referred to the *Times*' protection as a "privilege," in fact, that is a misnomer, as it is actually part of plaintiff's case. L. ELDREDGE, *supra* note 1, § 53, at 293.

49. 376 U.S. 254, 270 (1964).

50. *Id.* at 271-72, *citing* NAACP v. Button, 371 U.S. 415, 433 (1963).

51. *See* text accompanying notes 22-26 *supra*.

52. Rosenblatt v. Baer, 383 U.S. 75 (1966).

53. *Id.* at 86.

54. Eaton, *supra* note 46, at 1390.

law privilege of fair comment[55]—a privilege that was not restricted to statements concerning public officials, but rather applied to any "persons taking a public position on a matter of public concern."[56] It was in the lower courts that the *Times* standard was gradually extended to cover more than just the "public official."[57]

Dr. Linus C. Pauling was, and remains today, a scientist of international renown—he was winner of a Nobel Prize for chemistry and of a Nobel Peace Prize. He was, in addition, a vehement supporter of nuclear disarmament. The *National Review* published two articles that accused Pauling of being, *inter alia*, a "megaphone for Soviet policy" and of giving "his name, energy, voice and pen to one after another Soviet-serving enterprise." Dr. Pauling brought a libel action against National Review, Inc. and its owner, publisher, and editor.[58] The New York County Supreme Court dismissed the action, holding that Pauling was bound to meeting the *Times* malice standard, a burden that he could not sustain. The court stated that "[t]he matters he has disclussed [sic] are . . . matters of the gravest and most widespread public importance" and that "by his conduct, [Dr. Pauling has] made himself a public figure engaged voluntarily in public discussion of matters of grave public concern and controversy."[59]

Dr. Pauling instituted a second libel action,[60] in the district court in the Eighth Circuit, against the Globe-Democrat Publishing Company, based upon a newspaper editorial which falsely stated that Pauling had been cited for contempt of Congress. Consistent with the New York state court, the district court held that the *Times* standard was applicable. Judge Blackmun (now Supreme Court Justice Blackmun) stated:

> Professor Pauling, by his public statements and actions, was projecting himself into the arena of public controversy and into the very "vortex of the discussion of a question of pressing public concern." He was attempting to influence the resolution of an issue which was important, which was of profound effect, which was public and which was internationally controversial. Because of his world prominence—a factor stressed by his counsel in the present case—he was in a position of some influence on the problem's resolution. He obviously deemed himself influential and he was undertaking to provide leadership among academic and scientific people and to bring forces from many nations of differing political ideologies to bear upon the problem.[61]

55. For discussion of the fair comment privilege *see* notes 38-42 and accompanying text *supra*.

56. *See* A. HANSON, *supra* note 32, § 138, at 104. Indeed the *Times* Court may have contemplated this extension when it stated: "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, *or otherwise to specify categories of persons who would or would not be included.*"376 U.S. 254, 283 n.23 (1964) (emphasis added).

57. L. ELDREDGE, *supra* note 1, § 52, at 272.

58. Pauling v. National Review, Inc., 49 Misc. 2d 975, 269 N.Y.S.2d 11 (Sup. Ct. 1966).

59. *Id.* at 981, 269 N.Y.S.2d at 18 (error in official reporter only).

60. Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (8th Cir. 1966), *cert. denied*, 388 U.S. 909 (1967).

61. *Id.* at 195-96.

Blackmun concluded that "once the principle of *New York Times* is accepted . . . logic commands that it be applied to a person [who] has projected himself into the arena of public policy, public controversy, and 'pressing public concern.' "[62]

The United States Supreme Court squarely confronted the issue whether the *Times* standard was applicable to more than just "public official" plaintiffs in the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*.[63] The Court held that both Walker, a retired major general who had made numerous public statements through radio, television, and press conferences, and Butts, a nationally known college football coach, were "public figures" for purposes of a defamation action. In the lead opinion, written by Justice Harlan, four members of the Court[64] maintained that as public figures, Walker and Butts were entitled to recover damages for a defamatory falsehood upon showing "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[65] In his concurring opinion, however, Justice Warren stated that "differentiation between 'public figures' and 'public officials' and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy."[66] Thus he argued that the same *Times* standard should apply to both. Because the *Times* standard advocated by Warren was included a fortiori in the "reasonableness" standard proposed by Justice Harlan, and because Warren's was the fifth and decisive vote, the rule that emerged from the case derived from the Warren opinion. Therefore, a "public figure" defamation plaintiff could recover damages only upon a showing of either knowledge of falsity or reckless disregard for the truth.

"Unfortunately, the Court [in *Butts* and *Walker*] failed to provide a definition of 'public figure' that the lower courts could uniformly apply."[67] In his opinion, Justice Harlan stated:

> Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy, but both commended sufficient continuing public interest and had sufficient access to the means of counter-argument to be able "to expose through discussion the falsehood and fallacies" of the defamatory statements.[68]

In his concurring opinion Justice Warren focused upon those who were "intimately involved in the resolution of important public questions or, by

62. *Id.* at 197.

63. 388 U.S. 130 (1967).

64. Justices Clark, Stewart, and Fortas joined Harlan.

65. 388 U.S. 130, 155 (1967).

66. *Id.* at 163.

67. 46 TENN. L. REV. 252, 256 (1978).

68. 388 U.S. 130, 155 (1967), *citing* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting).

reason of their fame, shape events in areas of concern to society at large" in noting that "surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities."[69] A synthesis of these statements leads to the conclusion that under the *Butts-Walker* standard, one could become a "public figure" either by (1) a position of status alone, or (2) thrusting one's personality into the "vortex" of an important public controversy, if either was accompanied by both continuing public interest and ready access to the media.[70]

D. *The Emergence of the "Public Interest" Doctrine*

In 1971, the Supreme Court extended even further the protection to be afforded potentially defamatory publications in *Rosenbloom v. Metromedia, Inc.*[71] The defendant owned a radio station in Philadelphia, Pennsylvania. In a news broadcast, the plaintiff—a distributor of adult magazines—was referred to as a "girlie-book peddler" engaged in the "smut literature racket."[72] The primary question in *Rosenbloom* was whether a plaintiff who was not a "public figure" (as the term was roughly defined in *Butts-Walker*) might nonetheless have to satisfy the *Times* "actual malice" standard if the allegedly defamatory publication concerned a matter of general or public interest. The plurality of a divided Court[73] held that indeed such a situation required invocation of the *Times* standard:

> If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.[74]

The holding of *Rosenbloom* was succinctly stated by Justice Brennan: "We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection [as is afforded by the stringent *Times* "actual malice" standard] to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[75]

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69. 388 U.S. 130, 164 (1967).

70. *See* Bamberger, *supra* note 12, at 710.

71. 403 U.S. 29 (1971).

72. *Id.* at 34-35, *quoting* news broadcast of WIP, Philadelphia, Pa., on Oct. 21, 1963.

73. Justice Brennan announced the Court's judgment in an opinion in which Chief Justice Burger and Justice Blackmun joined. Justice Black and Justice White filed opinions concurring with the judgment, basing their opinions on analyses that were wholly different from that of the lead opinion. *Id.* at 57. Justice Harlan and Marshall filed dissenting opinions. *Id.* at 62, 78. Justice Douglas took no part in the decision of the case.

74. 403 U.S. 29, 43 (1971).

75. *Id.* at 43-44.

The *Rosenbloom* decision was a "sweeping extension" of the *Times* standard and a "drastic restriction" on the common law of actionable defamation.[76] Lower courts liberally applied the *Rosenbloom* "public interest" standard, requiring scores of plaintiffs to satisfy the *Times* standard.[77]

Justice Marshall[78] wrote a strong dissent in *Rosenbloom*, in which he criticized the Court for formulating a standard that failed to afford adequate protection to either the press or the defamation plaintiff. Marshall perceived the decision as a threat to a free press in that "courts will be required to somehow pass on the legitimacy of interest in a particular event or subject; what information is relevant to self-government"[79]—a task that Marshall felt the courts were ill-equipped to perform. Marshall also contended that the decision posed a threat to "society's interest in protecting private individuals from being thrust into the public eye by the distorting light of defamation."[80] In place of the plurality's ad hoc approach, Marshall suggested that a more appropriate balance could be struck by restricting defamation damage awards to actual losses.[81] He stated: "If awards are so limited in cases involving private individuals . . . it will be unnecessary to rely . . . on somewhat elusive concepts of the degree of fault, and unnecessary, for constitutional purposes, to engage in ad hoc balancing of the competing interests involved."[82] Marshall concluded with the caveat that absolute or strict liability should never be imposed upon the press, commenting that "[t]he effect of imposing liability without fault is to place 'the printed, written or spoken word in the same class with the use of explosives or the keeping of dangerous animals.' "[83] Thus, Marshall proposed a standard that continued to focus on the status of a particular plaintiff, but would require a "private" plaintiff to prove both some culpability (though certainly less than the imposition of the *Times* standard would mandate) and actual damages.

II. *Gertz v. Robert Welch, Inc.*: RETREAT TO THE PUBLIC FIGURE STANDARD

It was the reasoning of the Marshall dissent in *Rosenbloom* that

76. L. ELDREDGE, *supra* note 1, § 53, at 288.

77. *See* A. HANSON, *supra* note 32, text accompanying note 124 (3rd Supp.). ("[C]ourts . . . tended to be very liberal in finding matters of genuine public interest."); Robertson, *supra* note 16, at 206. ("Of over a hundred reported decisions dealing with the matter of public interest question, only six clearly concluded that the media publication or broadcast in question did not qualify.").

78. With Justice Stewart concurring and Justice Harlan concurring in part. 403 U.S. 29, 43 (1971).

79. 403 U.S. 29, 79 (1971).

80. *Id.*

81. In a libel action at common law, the jury could presume damages. *See* note 28 *supra*. Marshall would disallow these presumptive damages.

82. 403 U.S. 29, 86 (1971).

83. *Id.* at 87, *citing* W. PROSSER, THE LAW OF TORTS, § 108, at 792 (3d ed. 1964).

influenced the Court in *Gertz v. Robert Welch, Inc.*[84] In *Gertz*, a Chicago policeman had been convicted of murder. Prior to that conviction, the victim's family had retained Gertz, an attorney, to represent them in a civil action against the police officer. In opposition to Gertz's representation, Robert Welch, Inc. published an article in *American Opinion*, a John Birch Society publication, that falsely accused Gertz of arranging a "frame-up" and of being a "Communist fronter." The article also falsely implied that petitioner had a criminal record. Based upon the position that Gertz occupied as an attorney in a highly publicized lawsuit, the trial court found him to be a public figure and thus imposed the *Times* malice standard.

In *Gertz*, the Supreme Court unequivocally repudiated the plurality holding of *Rosenbloom*, and in its place substituted a formula that "effectively constitutionalized major areas of the law of defamation which had been untouched by any of the previous decisions."[85] The principal issue addressed by the Court in *Gertz* was whether a newspaper or broadcaster that published defamatory falsehoods about a private individual could claim a constitutional "privilege"[86] from liability for the injury inflicted by those defamatory statements.[87] Stated alternatively, was a private plaintiff in a defamation action bound to meet the *Times* "actual malice" standard?

The *Gertz* Court concluded that the plurality in *Rosenbloom* had erred in requiring a private plaintiff to meet the stringent *Times* standard. The Court maintained that the *Rosenbloom* plurality seriously abridged the state's legitimate interest in compensating individuals for the harm inflicted on them by defamatory falsehood.[88]

The Court noted that fundamental distinctions exist among private and public defamation plaintiffs. Accordingly, the Court focused on two major characteristics that justify separating these plaintiffs. First, the Court reasoned that both public officials and public figures usually have a greater ability to rebut defamatory publications because of "greater access to the channels of effective communication."[89] Second, the Court alluded to the likelihood that one who was either a public official or a public figure had implicitly assumed the risks that are associated with that status, and concluded that "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily ex-

84. 418 U.S. 323 (1974).

85. Eaton, *supra* note 46, at 1409.

86. *See* note 48 *supra* ("privilege" actually a misnomer).

87. In addition to resolving this issue, the Court also addressed two other issues of great importance to the law of defamation and held (1) that presumed and punitive damages were not recoverable by any plaintiffs absent satisfaction of the *Times* standard, and (2) that states could no longer impose liability without fault, regardless of the status of the plaintiff. *See* Frakt, *supra* note 16, at 471-72.

88. 418 U.S. 323, 346 (1974).

89. *Id.* at 344. Note that this was also one of the rationales offered by Harlan in the *Butts-Walker* decision in holding both of those plaintiffs to be public figures. *See* text accompanying notes 68-69 *supra*.

posed themselves to increased risk of injury from defamatory falsehood concerning them."[90] "Thus, private individuals," the Court summarized, "are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."[91] In conclusion, the *Gertz* Court relied on the availability of self-help, along with the risk of public status that the public plaintiff implicitly assumes, to re-establish plaintiff classifications and to abandon the *Rosenbloom* "public interest" test.[92]

The *Gertz* Court perceived a need to differentiate private from public defamation plaintiffs. Moreover, the Court perceived that such a distinction would be useless for lower courts unless some workable definition of "public figure" was established as well.[93] The Court articulated a definition that recognized two classes of public figures: first were those individuals who had achieved such "pervasive fame or notoriety" as to become public figures "for all purposes and in all contexts";[94] second were those who had voluntarily injected themselves, or were drawn into, a particular public controversy, thereby becoming public figures "for a limited range of issues."[95] Thus, the *Gertz* Court actually created three categories of potential public figure plaintiffs:[96] (1) those who were pervasively famous and were therefore public figures for all purposes; (2) those who had thrust themselves into a public controversy and thereby become public figures for a limited range of issues; and (3) at least hypothetically, those who had been involuntarily thrust into a public controversy and thereby might also become public figures for a limited range of issues.[97] Not surprisingly, the standard enunciated in *Gertz* was not dissimilar to the original public figure standard that emerged from *Butts* and *Walker*.[98] Both standards contemplated that public figure status might be attained by position alone or by voluntary participation in some public controversy. The major

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90. 418 U.S. 323, 345 (1974). Clearly it was this second rationale that the Court relied most heavily upon, because the Court itself expressed at least some discomfort with the first when it stated that "an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood." *Id.* at 344 n.9.

91. 418 U.S. 323, 345 (1974).

92. For criticism of the reliance that the *Gertz* Court placed on these rationales, *see* Ashdown, Gertz and Firestone: *A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645, 662 (1977).

93. While Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130 (1967), had created the public figure category, they only generally defined it—allowing both the Supreme Court and lower courts to interpret the concept fairly liberally—usually in terms of "public interest." Of course with Rosenbloom v. Metromedia, 403 U.S. 29 (1971), the public figure classification was set aside completely. Thus, it was left to the *Gertz* Court to provide some guidance to the lower courts that might enable them to distinguish public figures from private individuals. *See* Ashdown, *supra* note 92, at 678-79.

94. 418 U.S. 323, 351 (1974).

95. *Id.*

96. *See* Eaton, *supra* note 46, at 1421-22.

97. The Court recognized that "the instances of truly involuntary public figures must be exceedingly rare." 418 U.S. 323, 345 (1974).

98. For discussion of the *Butts-Walker* standard, *see* notes 63-70 and accompanying text *supra*.

difference between the standards is an implicit one—the broad language and policy considerations present in *Butts* and *Walker* allowed lower courts to expand application of the "public figure" test to include all plaintiffs who had become involved in a matter of "public interest." Conversely, because *Gertz* explicitly overruled the *Rosenbloom* public interest test, a similar expansion was not possible.

In *Times, Inc. v. Firestone*,[99] a case decided two years after the *Gertz* decision, the Supreme Court indicated that, in fact, the *Gertz* public figure standard was to be interpreted narrowly. The plaintiff, Mary Alice Firestone, had sued her husband, Russell Firestone, for separate maintenance. He in turn had counterclaimed for divorce on grounds of extreme cruelty and adultery. The trial attracted nationwide media coverage. Mrs. Firestone was a prominent member of Palm Beach, Florida society, whose activities drew widespread public attention—she even held several press conferences in the course of the divorce proceedings. *Time* magazine erroneously reported that the divorce had been granted on grounds that included adultery. Mrs. Firestone sued *Time* for defamation. *Time* unsuccessfully argued that Mrs. Firestone was a public figure who had to meet the *New York Times* malice standard.

In rejecting *Time*'s argument, the *Firestone* Court restricted the public figure standard that had emerged from *Gertz*. Although the first category of "general" public figures, those who because of fame become public figures for all purposes, was for the most part left intact,[100] the Court added to the second category, those who voluntarily thrust themselves into a public controversy, the requirement that the controversy be significant and that it be more than any controversy of interest to the public.[101] Moreover, in resolving an ambiguity with respect to the *Gertz* standard, the Court held that the voluntary participant must have attempted to influence the resolution of that controversy.[102] Finally, the third category of public figures, those who had been involuntarily thrust into a public controversy, was implicitly abolished.[103]

Applying the standard to Mrs. Firestone, the Court held: (1) that she had not assumed any role of especial prominence in the affairs of society,

99. 424 U.S. 448 (1976).

100. The Court did, however, appear to impose the additional requirement that the fame be of national proportion—local notoriety was deemed insufficient to render Mrs. Firestone a public figure. *Id.* at 453.

101. 424 U.S. 448, 454 (1976) ("[mistake to] equate 'public controversy' with all controversies of interest to the public").

102. This ambiguity was likely the result of two aspects of the *Gertz* decision. First, in *Gertz*, the public figure standard is twice articulated—the second of which does not make reference to the "influential motive" requirement. *Compare* 418 U.S. 323, 345 *with* 418 U.S. 323, 351. Second, because the *Gertz* Court acknowledged that one might involuntarily become a public figure, it seemed at least possible that an individual could become a public figure without actually attempting to influence the resolution of a public controversy. *See* text accompanying note 96 *supra*. Thus, even Justice Marshall did not believe the requirement of an influential motive to be part of the standard. *See* note 106 *infra*.

103. *See* Ashdown, *supra* note 92, at 660. This abolition may be directly related to the abolition of the *Gertz* "influential motive" ambiguity. *See* note 102 and accompanying text *supra*.

and thus was not a "general" public figure; (2) that because "public controversy" should not be equated with all controversies of interest to the public, it would be erroneous to conclude that the Firestone divorce was the kind of "public controversy" contemplated by *Gertz*; and (3) that because Mrs. Firestone had been compelled to appear in court, her actions could not be called "voluntary."[104]

Two significant conclusions flow from the *Firestone* decision. First, the Court made it clear that the standards enunciated in *Gertz* would not be easily satisfied; indeed, the Court may have even narrowed those standards.[105] Second, in focusing on the requirement that a significant public controversy be present, and by expressly requiring that the plaintiff has sought to influence the resolution of that controversy,[106] the Court retreated to the very ad hoc kind of determination that had encouraged it to overrule the *Rosenbloom v. Metromedia* "public interest" standard.[107] While *Rosenbloom* had required courts to make an ad hoc determination of whether a "matter of public interest" was present, *Firestone* required a similar determination with respect to whether a "public controversy" existed.

The two-part public figure standard that has emerged from *Gertz* and *Firestone* is amphibious, especially with respect to the "limited-issue" public figure category.[108] Consequently, lower courts have had difficulty in determining (1) what constitutes a "public controversy" as contemplated by *Firestone*, and (2) whether the particular activity of a particular defamation plaintiff is sufficient to render him "voluntarily involved" in the public controversy, thereby satisfying the second *Gertz* standard.

III. *Hutchinson v. Proxmire* AND *Wolston v. Reader's Digest Association*— THE CONFUSION CONTINUES

A. *The Lower Court Decisions*

The difficulties with the *Gertz* public figure standard are apparent in

104. 424 U.S. 448, 454-55 (1976) ("[R]esort to the judicial process . . . is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court," *citing* Boddie v. Connecticut, 401 U.S. 371, 376-77 (1971)).

105. *See* notes 100-103 and accompanying text *supra*.

106. Justice Marshall, in his dissent, roundly critized this requirement stating that the *Gertz* language was but an example of how one might attain the status of "public figure." Marshall concluded: "Surely *Gertz* did not intend to establish the requirement that an individual attempt to influence the resolution of a particular controversy before he can be termed a public figure. If that were the rule, Athletic Director Butts . . . would not be a public figure . . . and in *Gertz* we specifically noted that that decision was 'correct.' 418 U.S. at 343." 424 U.S. 448, 489 n.2 (1976).

107. *See* Ashdown, *supra* note 92, at 683-84 ("[*Firestone*] Court exacerbated the exact problem it professed to have found in *Rosenbloom*"); Eaton, *supra* note 46, at 1424 ("This is precisely the mischief for which the Court criticized *Rosenbloom*. . . .").

108. *See, e.g.*, Hotchener v. Castillo-Puche, 404 F. Supp. 1041, 1044 (S.D.N.Y. 1975) ("Perhaps if attorney Gertz was not a public figure, nobody is."); Rosanova v. Playboy Enterprises, Inc., 411 F. Supp. 440, 443 (S.D. Ga. 1976) ("[d]efining public figures is much like trying to nail a jellyfish to the wall").

the recent cases of *Hutchinson v. Proxmire*[109] and *Wolston v. Reader's Digest Association.*[110]

1. Hutchinson v. Proxmire

U.S. Senator William Proxmire awarded his notorious "Golden Fleece of the Month Award" each month to "honor" federal agencies for wasteful government spending. In April of 1975 the "award" was bestowed upon several federal agencies that had funded a scientific study of emotional behavior.[111] The propose of the study was to measure aggression by concentrating on the actions and reactions of captive laboratory animals.[112] Dr. Ronald R. Hutchinson, who had conducted the study, sued Proxmire, alleging that the national publicity surrounding the award had brought damage to his professional and academic reputation. When the dubious award was bestowed, Hutchinson was director of research at the Kalamazoo State Mental Hospital, which was operated by the Michigan State Department of Mental Health. Shortly thereafter, Hutchinson became director of research at the Foundation for Behavioral Research. At both institutions Hutchinson's research had been funded by the National Science Foundation, the National Aeronautics and Space Administration, and the Office of Naval Research. The agencies hoped to use the research to address problems associated with confining humans in close quarters for extended periods of time.[113]

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109. 443 U.S. 111 (1979).

110. 443 U.S. 157 (1979).

111. The press release that accompanied the award is reproduced in note 113 *infra.*

112. For example, in the study Dr. Hutchinson had examined the jaw-clenching propensities of certain animals when those animals were exposed to various aggravating and stressful stimuli.

113. The following are excerpts from a press release issued by Senator Proxmire in connection with the award:

> My choice for the Golden Fleece Award for the biggest waste of taxpayers' money for the month of April goes jointly to the National Science Foundation, National Aeronautics and Space Administration and the Office of Naval Research for spending almost $500,000 in the last seven years to determine under what conditions rats, monkeys and humans bite and clench their jaws. From the findings of these studies it is clear that the Government paid a half million dollars to find out that anger, stopping smoking, and loud noises produce jaw clenching in people.
>
> All this money was given to Dr. Roland [sic] R. Hutchinson of Kalamazoo State Hospital in Michigan. Last year alone the good doctor spent over $200,000 of which more than $100,000 were federal funds. And what are some of the other results reached by these research projects in the last seven years?
>
> Dr. Hutchinson told NASA that people get angry when they feel cheated and tend to clench their jaws or even scream and kick. NSF learned that Dr. Hutchinson's monkeys became angry when they were shocked and would try to get away from the shock. In addition, NSF was informed that drunk monkeys do not usually react as quickly or as often as sober monkeys and that hungry monkeys get angry more quickly than well-fed monkeys.
>
> The Office of Naval Research appears to have gotten the same type of so-called research as did the NSF and NASA.
>
> It is very interesting to trace the history of these extremely similar and perhaps duplicative projects. In 1967, NSF gave Dr. Hutchinson $44,700 to study "Environmental and Physiological Causes of Aggression." For two years, Dr. Hutchinson studied the biting reactions of monkeys when they received electric shocks. He also compared their reaction while being given a number of different drugs as alcohol and caffeine. In 1969, the NSF gave Dr. Hutchinson another $26,000 to continue these experiments. He received another grant, this one for $51,200 in 1970 from the NSF.

A central issue in *Hutchinson* was whether Hutchinson qualified as a "public figure" so that to prevail in his libel suit he would have to prove the *Times* "actual malice" standard.[114] If so, Hutchinson would be required to show that Proxmire either knew that the statements were false, or that he acted in reckless disregard of the truth.

Defendants asserted that Hutchinson met the *Gertz-Firestone* public figure standard because he had actively sought federal funding for his research; he was a widely publicized author in the scientific community;[115] he had been employed at various public institutions; he had been the subject of widespread media coverage; and, at least at the local level, he had had sufficient access to the press such that he could rebut Proxmire's allegations. Defendants further argued that a general public controversy did exist concerning wasteful or potentially wasteful government spending and that Hutchinson was a voluntary participant in that controversy—both by actively seeking federal funding for his research and by rebutting Proxmire's alleged defamations via local media coverage. Persuaded by defendants' arguments, the district court held that Hutchinson was a public figure.[116] Judge Leighton maintained:

> Given Dr. Hutchinson's long involvement with publicly-funded research, his active solicitation of federal and state grants, the local press

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> By this time Dr. Hutchinson was ready to extend his work to human biting and jaw clenching. In 1970, Dr. Hutchinson received a grant which ran for five years from the ONR to continue "research on sub-human primates to detemine the environmental, physiological and biochemical factors responsible for the maintenance of aggressive behavior and systematic replication of results objected in primates extended to human subjects." Total funding from the Navy ran to $207,000.
>
> During this period, Dr. Hutchinson applied for and received a $50,000 grant from NASA to develop measurements of latent anger or aggression in humans by means of jaw-clenching. In addition, Dr. Hutchinson received his fourth NSF grant in 1972 for $51,800 in order to continue his experiments on monkeys and extend the work to human jaw-clenching.
>
> Dr. Hutchinson, who, in addition to being Research Director at Kalamazoo State Hospital, is also an Adjunct Professor at Western Michigan University and President of his own non-profit Foundation for Behavior Research, has proposals presently pending before the NSF, the National Institute of Drug Abuse, and the National Institute of Mental Health to continue research on monkeys' drinking, drug and jaw clenching habits. If Dr. Hutchinson is successful in this new grantsmanship attempt, he would receive an additional $150,000 of taxpayers' money.
>
> The funding of this nonsense makes me almost angry enough to scream and kick or even clench my jaw.
>
> Dr. Hutchinson's studies should make the taxpayers as well as his monkeys grind their teeth. In fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer.
>
> It's time for the federal government to get out of this "monkey business." In view of the transparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it's time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking out of the taxpayer.

579 F.2d 1027, 1036-37 (7th Cir. 1978) (Appendix A).

114. Also at issue in the case was whether Proxmire's press releases and newsletters were protected by the Speech or Debate Clause of the Constitution and therefore immune from any defamation suit.

115. Hutchinson had published more than forty articles on behavioral science.

116. 431 F. Supp. 1311, 1327 (W.D. Wis. 1977).

> coverage of his research, and the public interest in the expenditure of public funds on the precise activities in which he voluntarily participated, the court concludes that he is a public figure for the purpose of this suit.[117]

On appeal, the Seventh Circuit affirmed the district court finding.[118] The court not only relied upon the standard articulated in *Gertz* and *Firestone*,[119] but also looked to the original public figure standard that had emerged from *Butts* and *Walker*:[120]

> Public figures are those who (1) have the appropriate status which either exists by their position alone or is achieved by their voluntarily thrusting themselves into the " 'vortex' of an important public controversy" and (2) have "sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements."[121]

Like the district court, the court of appeals focused on Hutchinson's solicitation of funding, his publications, and the local press coverage of his research. Additionally, the court of appeals looked beyond the *Gertz* standard itself to one of the rationale underlying that standard—that is, Hutchinson's ability to rebut Proxmire's statements through media access. The court reasoned that Dr. Hutchinson "was not forced to seek public funds and plaintiff's numerous articles and news stories which preceded his rebuttal press release demonstrate his public affirmation of the soundness of the research and the continued public funding thereof."[122] The court, which in quoting *Gertz* recognized the requirement that some public controversy be present, presumably acknowledged the existence of an ongoing controversy with respect to government dispersal of federal funds and potential improprieties surrounding those dispersals.[123]

2. Wolston v. Reader's Digest Association

Wolston brought a libel action against the author and publishers of a book that falsely accused him of being a Soviet agent. In January of 1957, Wolston, a naturalized American citizen who was residing in Washington, D.C., received a subpoena directing him to appear before a federal grand

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117. *Id.* In fact, the Court went on to conclude that Hutchinson was also a public official under the *Times-Rosenblatt* test. For discussion of that *Times-Rosenblatt* test, *see* notes 52-53 and accompanying text *supra*.

118. 579 F.2d 1027, 1034 (7th Cir. 1978). The court did not reach the issue whether Hutchinson was also a public official. *Id.* at 1035 n.14.

119. *See* notes 93-108 and accompanying text *supra* (discussion of the *Gertz-Firestone* public figure standard).

120. *See* notes 67-70 and accompanying text *supra* (discussion of the *Butts-Walker* public figure standard).

121. 579 F.2d 1027, 1034 (7th Cir. 1978), *citing* Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).

122. *Id.* at 1035 n.14.

123. This presumption logically flows from the Court's determination that Hutchinson was a public figure; for in setting out the applicable standard, the Court stated that public figures are those who have attained the appropriate status by voluntarily thrusting themselves into the vortex of an important controversy. *Id.* at 1034.

jury in New York City. That grand jury was investigating the activities of Soviet intelligence agents in the United States. Wolston responded to several such subpoenas but failed to respond to one that called for an appearance on July 1, 1958, insisting that the trip to New York was impossible because he was suffering from mental depression. A citation for contempt was issued, to which Wolston pleaded guilty after his pregnant wife, testifying on her husband's mental condition at the time of the subpoena, became hysterical on the witness stand. Wolston received a one year suspended sentence and was placed on a three year probation. These events were discussed in some fifteen newspaper stories in both New York and Washington, D.C., but the flurry of publicity soon subsided and Wolston returned to his normal, private life.[124] At no time was Wolston indicted for espionage.

In 1974 Reader's Digest Association, Inc. published *KGB, The Secret Works of Soviet Agents (KGB)*, written by John Barron.[125] The book describes Soviet espionage organizations and activities that have evolved since World War II. Wolston brought suit based upon objections he had to the following passage:

> Among Soviet agents identified in the United States were Elizabeth T. Bentley, Edward Joseph Fitzgerald, William Ludwig Ullman, William Walter Remington, Franklin Victor Reno, Judith Copton, Harry Gold, David Greenglass, Julius and Ethel Rosenberg, Morton Sobell, William Perl, Alfred Dean Slack, Jack Soble, *Illya Wolston*, Alfred and Martha Stern*. *No claim is made that this list is complete. It consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments or who fled to the Soviet bloc to avoid prosecution.[126]

The United States District Court for the District of Columbia concluded that Wolston was a public figure, and granted summary judgment for the defendants.[127] The court relied on the two-part *Gertz-Firestone* standard, and referred to Wolston as a "limited-issue" public figure.[128] The court recognized that the "limited-issue" public figure standard contemplated two principal considerations. First, the plaintiff must have been involved in a public controversy. Second, that involvement must have been both voluntary and significant.[129] Applying those considerations to the facts of *Wolston*, the court determined that indeed, the issue of foreign espionage qualified as a "public controversy."[130]

124. Wolston was, however, in two subsequent publications, implicated as a Soviet agent. *See* B. MORRIS, MY TEN YEARS AS A COUNTERSPY 176, 183, 187-91, 195-96, 204, 210, 222, 225, 229, 238, 247 (1959); and FBI, EXPOSE OF SOVIET ESPIONAGE, S. DOC. NO. 114, 86th Cong., 2d Sess. 24, 24-27 (1960).

125. J. BARRON, KGB, THE SECRET WORKS OF SOVIET SECRET AGENTS (Reader's Digest ed. 1974).

126. *Id.* at 188 (emphasis added).

127. 429 F. Supp. 167 (D.D.C. 1977).

128. *Id.* at 175-78.

129. *Id.* at 175-76.

130. *Id.* at 176.

Furthermore, by choosing not to appear before the grand jury, Wolston had "voluntarily" become involved in that controversy, thus inviting public scrutiny and relinquishing a measure of his own reputational interest.[131] The court concluded that "Illya Wolston does qualify under *Gertz* and *Firestone* as a public figure."[132]

On appeal, the Court of Appeals for the District of Columbia affirmed the district court.[133] On the issue whether Wolston qualified as a public figure, the court noted:

> By failing to appear before the grand jury Wolston invited public attention and comment. Until that failure occurred he enjoyed obscurity in the wings, but by subjecting himself to a citation for contempt he voluntarily stepped center front into the spotlight focused on the investigation of Soviet espionage. In short, by his voluntary action he invited attention and comment in connection with the public questions involved in the investigation of espionage.[134]

Consistent with the district court decision, the court of appeals focused on the necessity that both a public controversy, and voluntary involvement in that controversy be present, and found both conditions to be met.[135] Furthermore, just as the Seventh Circuit had done in affirming the *Hutchinson* decision, the D.C. Circuit likewise looked beyond the *Gertz* standard to an underlying rationale for the creation of the standard—here assumption of risk: "Wolston invited public attention and comment."[136]

3. *Conclusions*

Thus, in both *Hutchinson* and *Wolston*, the respective district courts thoughtfully concluded that Hutchinson and Wolston were public figures. In each case, the court had appropriately focused on both the *Gertz* and *Firestone* precedents, along with their predecessor *Butts*, in making the public figure determinations. Special attention was given to the questions whether a public controversy had existed and, if so, whether the plaintiff's involvement in that controversy was voluntary. In sum, the *Butts*, *Gertz*, and *Firestone* standards had been applied in a manner that was at least reasonable and intellectually defensible. Furthermore, both district courts

131. *Id.* at 176-77.

132. *Id.* at 176. The court, in finding that Wolston was a public figure, rejected two ancillary arguments that he had made: First, that the passage of time had removed any public figure status that he might have attained twenty years earlier, and second, that the *Gertz* protection should apply only to the press—not to the authors and publishers of books. *Id.* at 178.

133. 578 F.2d 427 (D.C. Cir. 1978).

134. *Id.* at 431.

135. The court here agreed that the passage of time did not affect Wolston's public figure status, *citing* Meeropol v. Nizer, 381 F. Supp. 29 (S.D.N.Y. 1974), *aff'd*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978), in which the court had held that the children of Julius and Ethel Rosenberg, despite the fact that their parents had been executed in 1953, nonetheless remained public figures in 1974. The *Wolston* court concluded that "[t]he mere lapse of time is not decisive." 578 F.2d 427, 431 (D.C. Cir. 1978).

136. *See* text accompanying note 134 *supra*.

were affirmed at the court of appeals level, where again the courts reasonably applied appropriate Supreme Court precedent—looking to the *Gertz* standard itself, and to the rationale that underlay its creation.

B. *The Supreme Court Decisions*

On June 26, 1979, the United States Supreme Court reversed both *Hutchinson v. Proxmire*[137] and *Wolston v. Reader's Digest Association.*[138]

1. Hutchinson v. Proxmire

In *Hutchinson*, the Supreme Court[139] concluded that the respondent had failed to identify a public controversy. Although the Court appeared to recognize a general public concern with respect to government expenditures, it reasoned: "that concern is shared by most and relates to most public expenditures; it is not sufficient to make Hutchinson a public figure."[140] Rather than looking strictly to the *Gertz* standard itself, the Court, as the Seventh Circuit had done, focused upon those rationales that underlie the distinction between a private individual and a public figure—the "assumption of risk" and "access to self-help" considerations. The court concluded that neither Hutchinson's professional activities (including his published writings), nor his applications for federal grants, had "invited that degree of public attention and comment . . . essential to meet the public figure level."[141] Further, the Court could not agree that Hutchinson "had such access to the media that he should be classified as a public figure."[142]

2. Wolston v. Reader's Digest Association

In *Wolston*, the Court[143] first focused upon the lack of voluntariness concerning Wolston's involvement in the public controversy that might pervade a Soviet espionage investigation: "It would be more accurate to say that petitioner was dragged unwillingly into the controversy. . . . [T]he mere fact that petitioner voluntarily chose not to appear before the grand jury, knowing that his action might be attended by publicity, is not decisive on the question of public figure status."[144]

The Court further looked to the *nature* of Wolston's involvement in the particular controversy at hand: "Nor do we think that petitioner

137. 443 U.S. 111 (1979).

138. 443 U.S. 157 (1979).

139. The Court's opinion was written by Chief Justice Burger. On the point of Hutchinson's public figure status, all but Justice Brennan joined. *Id.* at 133-36.

140. *Id.* at 135.

141. *Id.*

142. *Id.* at 136.

143. The Court's opinion was written by Justice Rehnquist. On the issue of Wolston's public figure status, Justice Blackmun filed a concurrence in which Justice Marshall joined, 443 U.S. 157, 169 (1979), and Justice Brennan dissented, *id.* at 172.

144. 443 U.S. 157, 166-67 (1979).

engaged the attention of the public in an attempt to influence the resolution of the issues involved. . . . There is no evidence that petitioner's failure to appear was intended to have, or did in fact have, any effect on any issue of public concern."[145] Examining the nature of the plaintiff's involvement, the Court relied on language that emerged from *Gertz* and *Firestone*, which appeared to require that the involvement be motivated by a desire to influence the resolution of the controversy present.[146] The Court further justified its analysis in concluding that one whose entrance into the public arena was not motivated by a desire to influence had not "assumed the risk" of defamatory statements.[147] Once again the Court looked beyond the *Gertz* standard itself, to a rationale that underlies that standard. This is exemplified in the Court's statement: "[W]e find no basis whatsoever for concluding that petitioner relinquished, to any degree, his interest in the protection of his own name."[148]

3. *Conclusions*

The legal analysis[149] of the Supreme Court decisions in *Hutchinson* and *Wolston* is wholly defensible. Both decisions are consistent with standards articulated in the earlier decisions of *Butts*, *Walker*, *Gertz*, and *Firestone*. In each case, the lower court was reversed not because it relied upon an erroneous standard, but because in applying the appropriate standard it either overemphasized elements that the Supreme Court thought were less important, or failed to recognize the narrowness of the standard that had been reflected in the *Firestone* interpretation of *Gertz*. The *Hutchinson* and *Wolston* decisions, however, in failing to provide any real clarification of the *Gertz* standard are arguably deficient, in terms of both lower court guidance and potential defendant reliance. The Court offers neither a clarification of extant standards, nor an articulation of an explicit new standard. Thus, the application of the *Gertz* standard remains unsettled[150] and potential parties, as well as lower courts, are left unable to determine who qualifies as a public figure. The resultant danger is that potential defendants, especially media defendants, will exercise more self-censorship than is necessary to protect them from defamation liability.[151]

145. *Id.* at 168.

146. *See* Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). *See also* note 102 and accompanying text *supra*.

147. 443 U.S. 157, 168 (1979).

148. *Id.* The majority did not reach the issue whether the passage of time could remove public figure status. *Id.* at 166 n.7. In a concurrence, Justices Blackmun and Marshall stated their position that the passage of sixteen years had, indeed, removed any public figure status that Wolston may have previously obtained. *Id.* at 170.

149. Note again that this Comment does not, nor is it meant to, address the issue of either the political, social, or historical appropriateness of the balance that has been formulated. For discussion of those questions, *see* authorities cited in note 16 *supra*.

150. *See* note 108 *supra*.

151. With respect to the *Gertz* standard, one commentator has written, "[T]he . . . distinction between public and private plaintiffs . . . is not one easily made by editors and broadcasters and may therefore increase the threat of self-censorship." Brosnahan, *supra* note 16, at 794.

Perhaps most distressing is the Court's insistence upon implicitly incorporating the availability of self-help and assumption of risk—the rationales that underlie creating a public figure classification—into the standard itself.[152]

Predictability is a desirable, perhaps even a necessary component of an effective legal system, as it enables parties to assess the potential consequences of their conduct.[153] Predictability is especially important in the area of first amendment rights, where without it speech entitled to constitutional protection may be chilled. Thus, it is vital that some clarification of the public figure standard occur. It is not necessary to upset the balance formulated by the present Supreme Court between reputational interests and first amendment values; yet a clarification of the existing standard could lend lucidity and consistency to an otherwise unnecessarily confused area of the law of defamation.

IV. ARTICULATING A NEW STANDARD

The standard that emerged from *Gertz* recognized two classes of public figures: (1) those who occupy positions of such pervasive fame or notoriety that they are deemed public figures for all purposes, and (2) those who have voluntarily thrust themselves to the forefront of a particular public controversy, thereby becoming public figures for a limited range of issues.[154] Recognition of public figure status via the first of these classifications has been infrequent and interpretation of that standard has not caused any real inconsistencies among courts.[155] However, the second class of public figures (the "limited-issue" public figure), exemplified in *Hutchinson* and *Wolston*, rests upon a vague standard that has proven difficult to interpret and apply.[156] It is submitted that this "limited-issue" standard can be clarified—both by altering the conceptual approach of the standard and by reducing the ambiguities inherent in the current language of the standard. It is further submitted that such changes can be made without significantly upsetting the present balance that exists between first amendment values and protecting the individual's interest in reputation.

The first step necessary to clarify the "limited-issue" public figure standard is to eliminate the "public controversy" requirement—a require-

152. For more detailed discussion, *see* note 166 and accompanying text *infra*.

153. *See* Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 240 (1970) ("We fully recognize that important policy considerations militate in favor of continuity and predictability in the law."); Regan v. New York, 349 U.S. 58, 64 (1955) ("Law strives to provide predictability so that knowing men may wisely order their affairs.").

154. 418 U.S. 323, 351 (1974). *See* notes 94-95 and accompanying text *supra*.

155. There has been some question with respect to whether national or local notoriety is necessary to attain the "general" public figure status. The *Firestone* decision appears to require national notoriety. *See* note 100 *supra*.

156. Another example of the confusion that pervades the *Gertz* "limited-issue" public figure standard can be found in Dodrill v. Arkansas Democrat Co., 538 S.W.2d 549 (1979) and Dodrill v. Arkansas Democrat Co., 590 S.W.2d 840 (1979). In *Dodrill*, the Arkansas Supreme Court, in a period of less than nine weeks, completely reversed itself on the question whether the plaintiff was a public figure.

ment that often does more to blur than to elucidate the relevant issues. Although some requirement of "publicness" is necessary, as that is the very foundation upon which the standard rests, the present standard could be revised so that the trier is asked to determine whether the alleged defamation was made with respect to a "matter of public concern." Such an alteration does not significantly affect the present balance that exists between defamation and first amendment values. Clearly any "public controversy" is likewise a "matter of public concern." It is also likely that most "matters of public concern" can somehow be caught up in "public controversy," as public unity is undeniably a rare occurrence. Still, even in those instances in which a particular "matter of public concern" is not accompanied by some controversy, the proposed standard still contemplates consideration of the particular activity of the plaintiff, and its relationship to the subject matter at hand. Thus, the proposed revision does not, as some might argue, denote a retreat to the *Rosenbloom* "public interest" test[157] because *Rosenbloom* focused solely on the subject matter involved, not the status of the plaintiff. In addition, the proposed "public concern" test, because it bears a more significant relationship to objective criteria such as newsworthiness or media attention, could be more easily applied by the courts, which, in deciding the "public controversy" question, are forced to determine whether the amorphous indicia of controversy are present (*i.e.* confrontation, polarization, etc.) as well as whether the controversy is "public."[158]

A second step necessary to clarify the present standard is to articulate more explicitly the relationship that must exist between the particular plaintiff's activities and the "matter of public concern." The analysis proposed here consists of three parts. First, the trier of fact determines whether the plaintiff's activities were undertaken *voluntarily*—this requirement already exists as part of the present *Gertz-Firestone* standard. The appropriate question would be a narrow one: Were those specific activities cited as rendering the plaintiff a public figure undertaken willfully and with the knowledge that they would bear some reasonably foreseeable relationship to a "matter of public concern"? Second, and separate from the voluntariness inquiry, is the question whether the activity related to an issue *central* to the "matter of public concern." In those cases in which the activity related to issues that were only peripherally or collaterally connected to the "public concern," the proposed standard is not met and the plaintiff would remain a private individual, free from the imposition of the *Times* "malice" standard. Third, is the clarification of the present requirement that the plaintiff's activities constitute a conscious attempt to *influence* the resolution of some issue central to a "matter of public concern." Mere involvement, without this influential motive, would

157. For discussion of the *Rosenbloom* public interest test, *see* notes 71-77 and accompanying text *supra*.

158. *See* Ashdown, *supra* note 92, at 684.

not be enough. This requirement was alluded to by the Supreme Court in both *Gertz*[159] and *Firestone*,[160] and later referred to by the *Wolston*[161] Court. Lower courts, however, still are confused with respect to both the necessity of this requirement, and the stringency of it.[162] Thus, the requirement should be made an explicit part of the standard. Further, to accommodate the apparently rigid attitude[163] that the Supreme Court has expressed toward this requirement it would be helpful if it were restated as "any attempt to influence public opinion," relieving lower courts of the burden of examining either the scope or the effectiveness of the attempt. Thus, in passing upon the relationship that would have to exist between a potential public figure and the "matter of public concern," a court would look to the voluntariness and the centrality of the activity, as well as to the motive behind the activity.

Finally, the "limited-issue" public figure standard should expressly adopt the requirement that the plaintiff's activities occur before publication of the alleged defamation. This requirement recognizes that activity undertaken in response to a defamation is not in any real sense voluntary. It adopts the attitude that such responses, which may be an individual's only real opportunity to vindicate his reputation, are per se involuntary, thus taking temporal considerations outside of the adjudication of the "voluntariness" issue.[164]

Thus, the proposal offered introduces a five part, "limited-issue" public figure standard: an otherwise private individual would become a public figure for a limited range of issues when he (1) voluntarily (2) attempts to influence public opinion with respect to (3) an issue that is central to (4) a matter of public concern, where (5) such activity occurs prior to the alleged defamation. Perhaps the most important aspect of this proposal is that, with this clearly articulated standard in hand, courts can avoid consideration of the rationales of availability of self-help and assumption of risk that underlie the adoption of a public figure standard. It is presumed that one who is a public figure has (1) access to self-help, and (2) assumed the risk of public exposure, but those presumptions should not be a part of the standard utilized in adjudicating any particular controversy. Access to self-help and, to an even larger degree, assumption of risk, are already slippery tort law concepts. When considered with respect to a specific factual pattern, those concepts only add confusion to an already

159. 418 U.S. 323, 345 (1974).

160. 424 U.S. 448, 453 (1976).

161. 443 U.S. 157, 168 (1979).

162. For a discussion of the genesis of this confusion, *see* notes 102-106 *supra*.

163. This rigidity is reflected in the Court's statement that "[t]here is no evidence that petitioner's failure to appear was intended to have, or did in fact have, any effect on any issue of public concern." 443 U.S. 157, 168 (1979).

164. The per se standard would appear to be congruent with present Supreme Court attitudes. *See* Hutchinson v. Proximire, 443 U.S. 111, 135 (1979) ("Clearly those charged with defamation can not, by their own conduct, create their own defense by making the claimant a public figure.").

complex area. For example, in a situation in which, following an alleged defamation, a plaintiff had ready access to the media to rebut that defamation, a court, in looking to those factors that the Supreme Court has set out as important, would not know whether to label the plaintiff a public figure because of the access to self-help, or a private individual because his activity occurred after the alleged defamation. Thus, even accepting the *Gertz* assertion that media access and assumption of risk are sufficient rationales for creating a public figure standard,[165] incorporating those considerations into the standard itself creates confusion that inevitably renders the law less predictable. Given the constitutional mandate of a free press, media actors must be allowed to rely on more than a purely subjective public figure standard in choosing an appropriate course of conduct. Nor is it an unusual occurrence in our legal system to look beyond the facts of a particular case to promote values of significant social importance.[166] Under the proposed standard, the availability of self-help and assumption of risk are not considered in determining whether a plaintiff is a public figure, but rather are presumed if the plaintiff is found to be a public figure. Such presumptions flow naturally from the requirement that the plaintiff voluntarily seek to influence public opinion with respect to an issue central to a matter of public concern. In a situation in which the presumptions do not apply, the argument is that our system sometimes requires that individuals make sacrifices when an overriding societal value is at stake.

It can be legitimately questioned whether the proposed standard would, in fact, aid the courts by lending itself to a more consistent and predictable application that is consistent with the present attitude of the Supreme Court with respect to the defamation-first amendment balance. In answering that question, it is useful to conjecture how *Hutchinson* and *Wolston* might have been decided had the lower courts had the proposed, five-part standard before them.

In *Hutchinson*, clearly a "matter of public concern" did exist with respect to the propriety of government expenditures. Moreover, Hutchinson's rebuttals to Proxmire's statements were clearly undertaken willfully, with the knowledge that they bore a relationship to that public concern and therefore met the "voluntariness" requirement. Indeed the rebuttals were made in an attempt to influence public opinion with respect to an issue that was central to public concern. However, because Hutchinson's activity with respect to the public concern occurred subsequent to the alleged

165. For criticism of that position *see* Ashdown, *supra* note 92.

166. Perhaps an analogy can be drawn here to the infamous *Miranda* decision. Miranda v. Arizona, 384 U.S. 436 (1966). There the Supreme Court, in looking to the inherently coercive environment of the police interrogation, along with the likelihood that many citizens are not fully aware of their constitutional protection, imposed stringent advice requirements on law enforcement agencies. Yet with respect to any particular interrogation, courts are not asked to determine whether, in fact, the interrogation was coercive, or whether, in fact, the suspect was not aware of his constitutional rights. Rather, in a situation where the *Miranda* warnings are required, those factual underpinnings are presumed to exist. As the Court stated: [W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Id.* at 468.

defamation, Hutchinson would remain a private individual who would not have to meet the *Times* standard.

In *Wolston*, the plaintiff's activity (his refusal to appear before the grand jury) was voluntary.[167] His activities related directly to domestic spying activity, which was an issue central to the public concern that existed with respect to foreign espionage. Wolston's refusal to testify before the grand jury, however, did not occur as part of any attempt to influence public opinion with respect to espionage, as he was only seeking to protect his own mental health. Thus, the proposed standard would not have been met and Wolston would remain a private individual. To conclude, if the lower courts that adjudicated *Hutchinson* and *Wolston* had had the proposed standard before them, they would likely have reached the same result as that reached by the Supreme Court: that neither Hutchinson nor Wolston was a public figure.

V. CONCLUSION

With the decisions in *Butts* and *Walker*, the United States Supreme Court first recognized that the first amendment protection afforded by the *Times* "actual malice" standard should be extended for the honest misstatement of facts concerning "public figures." In *Rosenbloom v. Metromedia*, a plurality of the Court abandoned the "public figure" test, and instead extended the *Times* protection to statements concerning any matter of "public interest." In *Gertz*, however, the Court determined that the *Rosenbloom* standard failed adequately to protect a private individual's reputational interests and thus reestablished the "public figure" classification. Unfortunately, the standard that emerged from *Gertz* was not a clear one.

With the *Hutchinson* and *Wolston* cases, the United States Supreme Court had the opportunity to clarify the *Gertz* "public figure" standard. Such a clarification could have provided guidance to lower courts in making future public figure determinations and protected potential defendants from undue self-censorship. Although the Court held that neither Hutchinson nor Wolston was a public figure, it failed adequately to explain why. Thus, both lower courts and potential parties are left unable to apply the *Gertz* standard with any real confidence.

This Comment has developed a proposed standard that, while not altering the balance the Court has made between reputational interest and the first amendment, nonetheless provides a clearer and more comprehensive guide for lower courts in making public figure determinations. While concededly the proposed standard is not pervasively different from the present one, it offers changes in both approach and language that do much to clarify an otherwise confused area of the law. Under the proposed

167. *See* Wolston v. Reader's Digest Ass'n, Inc., 429 F. Supp. 167, 177 (D.C. Cir. 1977) ("In choosing not to comply, Wolston knew, or certainly should have known, that he would attract attention. . . .").

standard, a plaintiff is a public figure if he voluntarily attempted to influence public opinion with respect to an issue central to a matter of public concern, prior to the alleged defamation. Adoption of this standard would spare lower courts the difficulties that flow from the ambiguous and causistic nature of the present standard.

Finally, as a way of evaluating the proposed standard, had it been available, the plaintiffs in both *Hutchinson* and *Wolston* would not have been deemed "public figures" by the lower courts, thus eliminating the necessity for Supreme Court reversal.

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